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IN THE

Supreme Court of the United States

October Term, 1961.

No. 177.

DAGNY PLUM,
Petitioner.

v.

TAMPAX, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

In addition to the opinions noted by the Petitioner (Pet. 14-20), the first opinion of the Supreme Court of Pennsylvania is reported at 399 Pa. 533, 160 A. 2d 549 (1960).

QUESTION PRESENTED.

May the Pennsylvania courts apply their doctrine of forum non conveniens to dismiss the action of a Danish nonresident against a foreign corporation nonresident in Pennsylvania?

STATEMENT.

Petitioner commenced this action against respondent in the Court of Common Pleas No. 1 of Philadelphia County by writ of foreign attachment, naming certain garnishees, and filed a complaint in equity for an accounting. Respondent was not served.

The action was dismissed by the Court of Common Pleas. On appeal it was remanded by the Supreme Court of Pennsylvania to the lower court to determine whether the Pennsylvania doctrine of forum non conveniens applied. On remand, the lower court dismissed the action on the ground of forum non conveniens. The Supreme Court of Pennsylvania affirmed that dismissal as a proper exercise of judicial discretion. Adopting the findings of fact below, the Pennsylvania Supreme Court summarized these findings as follows:

> "Plaintiff is a Danish subject and a nonresident of this Country and the defendant is a nonresident foreign corporation, not registered to do business in Pennsylvania and not maintaining any office listings or employees or agents in Pennsylvania. The contract underlying this suit was entered into in Copenhagen, Denmark, and is to be performed entirely within the State of New York. No element of the performance of the contract has taken place, nor is to take place, in the Commonwealth of Pennsylvania. The contract provides that any disagreement between the parties as to its provisions shall be settled in accordance with the laws of Denmark. It also provides that certain Danish courts, enumerated therein, shall be fully competent to pass a judgment on any action relating to the agreement. All of defendant's witnesses would be required to come from jurisdictions other than Pennsylvania. Its books and records sought to be examined by plaintiff are physically outside Pennsylvania.

"The following alternative forums are available to the plaintiffs: (a) The courts of New York State which are available to foreign nonresident plaintiffs in actions against corporations doing business in New York State with their principal offices therein, or (b) The courts of Denmark which are available to a Danish subject in an action against the foreign parent corporation of a Danish corporation which has agreed to submit to the jurisdiction of certain Danish courts. The statute of limitations in New York State on actions on contract has not run against the plaintiff. In addition, and of great weight, plaintiff seeks to invoke the equity power of the courts of Pennsylvania in order to require certain acts to be done by the defendant outside of Pennsylvania. In light of all of these facts we cannot say that the trial court abused its discretion." *Plum v. Tampax, Inc.*, 402 Pa. 616, 618-19, 168 A. 2d 315, 316-17 (1961).

In her complaint petitioner had alleged the following, inter alia, concerning the underlying controversy:

1. Petitioner entered into a written agreement with respondent on March 15, 1959.

2. In accordance with this agreement, a corporation known as Tampax, Scandinavia A/S ("The Danish Company") was created under the laws of Denmark and 25% of its outstanding and issued stock was transferred to the petitioner.

3. The Danish Company created a wholly-owned subsidiary, Tampax Scandinavia A/B ("The Swedish Company") and a Norwegian Agency ("The Norway Agency").

4. Respondent controls and supervises the operations of these "subsidiaries," determines and approves the purchase and sales price of Tampax, the expenditures and all business activity of these "subsidiaries," and it makes up, supervises and approves their balance sheets and profit and loss statements.

5. Respondent has deprived petitioner of her 25% of the profits of the Scandinavian business by reducing the profit margins of the Danish and Swedish companies.

6. Respondent has not permitted petitioner to examine certain itemized books, records and agreements pertaining to its various companies.

7. The books and records of these Scandinavian corporations and certain other foreign subsidiaries of respondent are kept and maintained by the respondent in its New York office.

On the basis of these allegations petitioner had asked, as relief, that respondent be ordered to:

> (1) make "available at its New York office for examination and inspection" by the petitioner "the books and records which will show all the transactions of:
>
> (a) The Danish company
>
> (b) The Swedish company, and
>
> (c) The Norway Agency"
>
> (2) "Exhibit for inspection and examination" by the petitioner, "through her constituted agents, all agreements and documents in force through the years 1955, 1956, 1957 and 1958 providing for the sale by the respondent and the English company and/or the European company to subsidiary companies distributing tampax in other countries of the world and including therein the transactions with the Danish and Swedish companies;"
>
> (3) "Submit an accounting of the profits earned by the Danish and Swedish companies;"
>
> (4) "Furnish interim balance sheets and profit and loss statements of the Danish and Swedish companies simultaneously with their preparation and delivery" to the respondent; and

(5) "Establish" in the petitioner "by appropriate agreements and documents a 25% share of the Norway Agency."

Respondent had filed Preliminary Objections to the complaint raising questions of jurisdiction. These had been sustained by the Court of Common Pleas No. 1 of Philadelphia on December 28, 1959.

An appeal from this decision had been taken by the petitioner to the Supreme Court of Pennsylvania. On May 4, 1960, that Court, after a careful consideration of the doctrine of forum non conveniens had reversed the decision of the lower court and remanded the case for proceedings in accordance with its opinion, stating:

". . . The sole connection the case has with Pennsylvania is the fact that a debtor of the defendant could be served herein, thus making a foreign attachment possible.

"The witnesses which defendant would be required to have testify in this case are either in New York City, Denmark or other European countries; we can anticipate that it would be costly and inconvenient to have them appear in Pennsylvania. Similar inconveniences may arise if the books and records which apparently form a substantial part of the proposed evidence must be brought here from New York City. Finally, the plaintiff would have us extend our processes and equity power beyond our borders, on the strength of assets reached only by the writ of foreign attachment, to compel an examination of books and records and other relevant documents in New York City and, assuming judgment in the plaintiff's favor, to render a decree giving plaintiff a 25% share of the Norway agency.

"Nevertheless, even though we might feel that a Pennsylvania court is a most inappropriate trial forum, the case must be remanded. The court below, not having the benefit of our present decision, has neither exercised

> any discretion in this matter nor made any determination of whether an alternative forum is available to the plaintiff. While, on the face of the record, it would appear that either New York or Denmark might provide an appropriate forum, there is the possibility of a statute of limitations problem and also a question of whether the courts of New York State or Denmark would be willing to hear this case. Proper application of the doctrine of Forum Non Conveniens necessitates that the court below make a finding as to the availability of other forums and then exercise its discretion after considering all the factors." *Plum v. Tampax, Inc.*, 399 Pa. 553, 562-63, 160 A. 2d 549, 554 (1960).

On November 16, 1960, after further pleadings, argument and the filing of briefs, the complaint had been dismissed by the lower Pennsylvania court on the ground of forum non conveniens.

On appeal, the Supreme Court of Pennsylvania on January 30, 1961 affirmed the dismissal of the Complaint for the reasons stated above at pages 2 and 3. *Plum v. Tampax, Inc.*, 402 Pa. 616, 168 A. 2d 315 (1961). Petitioner's Petition for Reargument was denied, in a *per curiam* decision, without opinion, by the Supreme Court of Pennsylvania on March 28, 1961.

ARGUMENT.

The issue presented here is not, as petitioner suggests, whether she may be excluded from the Pennsylvania courts on the ground that she is a subject and a resident of Denmark. She has not been so excluded. The issue is whether the petitioner, just because she is a Danish subject, must be allowed to bring her suit in any state she chooses—even one that would exclude, under its rule of forum non conveniens, a United States citizen similarly situated if resident in another state.

That petitioner was not excluded from the Pennsylvania courts on the ground that she is a subject and resident of Denmark is obvious from the opinion of the Supreme Court of Pennsylvania in affirming the dismissal of petitioner's suit in Pennsylvania. Considering the petitioner's case with great concern for the protection of her rights, that Court carefully stated its reasons for affirming dismissal, as set forth above at pages 2 and 3.

Petitioner's argument, therefore, would seem to be twofold: (1) the first nonresident litigant excluded from a state's courts on the ground of forum non conveniens has been subjected, simply because he is the first, to discrimination forbidden by the Fourteenth Amendment; (2) even if the doctrine of forum non conveniens had been established in a state for fifty years in cases involving nonresident United States citizens, a treaty granting to a Danish citizen "national treatment . . . with respect to access to the courts of justice within the territories of the other party, in all degrees of jurisdiction . . . in pursuit of their rights" prevents the state court from applying its doctrine of forum non conveniens where a Danish citizen is a plaintiff. Both arguments are completely untenable.

1. Petitioner's first argument is based on the assertion that a writ of foreign attachment may be utilized in Pennsylvania whenever the defendant is a nonresident owning

property within the Commonwealth and that the Pennsylvania Supreme Court "has at all times in the past held that nonresidents could invoke the Writ of Foreign Attachment in Pennsylvania" (Pet. 7). For this proposition she cites several cases where nonresidents have been allowed to avail themselves of this method of starting suit. She cites only one case,[1] however, where the Supreme Court of Pennsylvania discussed the question of forum non conveniens and did not dismiss the suit, but she omits the pertinent fact that the court merely noted that the lower court had not abused its discretion in refusing to apply the doctrine under the facts of that case.

But even if a long line of Pennsylvania Supreme Court cases involving writs of foreign attachment had specifically denied the existence of the doctrine of forum non conveniens in Pennsylvania, petitioner's argument could only be that a state is constitutionally prohibited from applying the doctrine of forum non conveniens for the first time to a nonresident. This is obviously absurd. It is well settled that a state court may decline jurisdiction by applying the doctrine of forum non conveniens,[2] and, as Justice Frankfurter has noted, whether a state decides to accept or reject the doctrine is strictly a matter of state law.[3] It is equally well settled that state courts may overrule their own prior decisions without running afoul of any constitutional guaranties. This is true even where parties may have relied to their detriment on the past decisional law,[4] a reliance which could not be and has not been shown in this case.

In this case, moreover, the Pennsylvania Supreme Court carefully examined (in its first opinion) the doctrine

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1. *Fairchild Engine & Airplane Corp. v. Bellanca Corp.*, 391 Pa. 177, 137 A. 2d 248 (1958).

2. See, e.g., *Williams v. North Carolina*, 317 U. S. 287, 294 (1942) and discussion in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 504 (1947).

3. *Southern Railway Co. v. Mayfield*, 340 U. S. 1, 4 (1950).

4. See, e.g., *Tidal Oil Co. v. Flanagan*, 263 U. S. 444 (1924); *Brinkerhoff Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930).

of forum non conveniens before setting forth the relevant factors and remanding the case for decision on the basis of these factors, and it carefully reviewed (in its second opinion) the application of the doctrine to this petitioner before deciding that, as a matter of Pennsylvania law, the lower court had not abused its discretion in applying the Pennsylvania doctrine of forum non conveniens in dismissing the suit. In view of the Pennsylvania state courts' findings of fact, it is difficult to conceive of a case in which a state court could more aptly exercise its discretion to apply the doctrine of forum non conveniens, let alone conceive of this case giving rise to a question deserving of review by this Court.

2. Petitioner's second argument is equally untenable. Despite the fact that her controversy is completely lacking in contacts with Pennsylvania, she maintains that the treaty with Denmark prohibits Pennsylvania from applying the doctrine of forum non conveniens to her. Yet the treaty defines "national treatment" as that accorded in like situations to "nationals" of the United States (Pet. 11). It does not say that a Danish citizen's rights are to rise higher with respect to access to Pennsylvania courts than those of citizens of the United States—e.g., California citizens—who are nonresidents of Pennsylvania.

To accept petitioner's position would require reading the treaty to afford a Danish plaintiff the absolute right to bring suit against any defendant in any state where the defendant was owed money and *quasi in rem* jurisdiction was available generally. Thus a Danish plaintiff could disregard states such as New York, which the Pennsylvania court found has contacts with the controversy here and which it found available to the petitioner here, and choose as his forum states like Pennsylvania, California, Alaska or Hawaii, with no contacts at all with the controversy. Precisely this type of argument was made and rejected in *Universal Adjustment Corp. v. Midland Bank*, 281 Mass. 303, 184 N. E. 152 (1933), where the Supreme Judicial Court said:

"The construction of the treaty for which the plaintiff contends would give to Russian corporations who appear in our courts greater rights and privileges than are accorded to other litigants in numerous particulars. (1) It would exonerate them from the rule of forum non conveniens, applicable to all other parties to suits, including individual citizens of Russia. (2) It would give to them greater privileges than are possessed by corporations of sister States of the Union, which always are held subject to that rule." 184 N. E. 152, 163.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.

July, 1961.